

DEC 19 1995

RECORDS BUREAU

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 61-94:

SMITH VALLEY TEACHERS
ASSOCIATION, MEA/NEA,

Complainant/Appellant

vs.

SMITH VALLEY ELEMENTARY SCHOOL
DISTRICT NO. 89, FLATHEAD COUNTY,

Defendant/Respondent.

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND ORDER

* * * * *

I. INTRODUCTION

Unfair Labor Practice charges were filed by the Smith Valley Teachers Association, affiliated with the Montana Education Association, NEA of Missoula, Montana, against the Smith Valley Elementary School District No. 89, Flathead County, Montana on September 7, 1994.

An in-person hearing on the above matter was held on April 12, 1995, in Kalispell, Montana before Gordon D. Bruce, duly appointed Hearing Officer of the Department of Labor and Industry. The Complainant was represented by its counsel, Karl J. Englund. Defendant was represented by its counsel, Michael Dahlem. Witnesses Renee Boisseau, Stephen Foster and Tammy Strenel gave sworn testimony at the hearing. Subsequent to the close of hearing, parties filed their post-hearing briefs with the Hearing Officer and final briefs were filed on May 25, 1995. On August 28, 1995, Findings of Fact; Conclusions of Law; and Recommended Order was issued by Gordon D. Bruce.

1 Notice of Appeal/Exceptions to the Hearing Officer's Findings
2 of Fact; Conclusions of Law; and Recommended Order were filed by
3 the Complainant on September 18, 1995. On October 25, 1995, oral
4 arguments were held before the Board of Personnel Appeals. Karl J.
5 Englund, Esquire, and Michael Dahlem, Esquire, each presented oral
6 argument on behalf of their respective clients. Upon considering
7 the record, written briefs and oral arguments of the parties, the
8 Board finds, concludes and orders as follows:

9 **II. ISSUE**

10 Whether the Smith Valley Elementary School District No. 89,
11 Flathead County, Montana violated Section 39-31-402 (1) and (5),
12 MCA.

13 **III. FINDINGS OF FACT**

14 1. As a result of a reduction of 4.5% in State funding for
15 Smith Valley Elementary School District No. 89 for the 1994-95
16 school year the school board (the "school board") was prompted to
17 propose a wage and benefit freeze in negotiations with the Smith
18 Valley Teachers Association (SVTA) as a means to control its costs.
19 (Testimony of Stephen Foster, tape 3).

20 2. Ultimately the school board first contacted the SVTA on
21 January 18, 1994 to request the commencement of 1994-95
22 negotiations on January 27, 1994. The SVTA proposed March 7, 1994,
23 as the date for the opening session and rejected the board's
24 proposal for an earlier session, noting that negotiations
25 traditionally began around the first of April. When this request
26 was rejected, the board again requested a negotiation date on
27 January 27, 1994. (Exhibit J-4)

28

1 3. Subsequently, on February 17, 1994, the school board
2 communicated its first offer to the Association through the mail.
3 The proposal called for a two year freeze in teacher salaries,
4 steps (experience), lanes (education) and the district's health
5 insurance contribution. (Exhibits J-4 and 14; Testimony of Stephen
6 Foster, tape 3).

7 4. By agreement of SVTA and the school board, the first
8 negotiation session took place on March 7, 1994. Ground rules were
9 adopted on March 21, 1994. Nothing in the ground rules limited the
10 parties' right to introduce new proposals during the course of
11 negotiations. (Exhibit 17, Testimony of Renee Boisseau, tape 2).

12 5. The SVTA's first wage proposal was made approximately
13 March 21, 1994. At this third session, SVTA called for an increase
14 of approximately 4% in the base salary, step and lane increases for
15 the 1994-95 and the 1995-96 school years and an increase in the
16 district's contribution for health insurance for the 1995-96 school
17 year. The district estimated the cost of the proposal at about
18 \$60,000. (Exhibit 16; Testimony of Renee B, tape 2; Stephen
19 Foster, tape 3).

20 6. Agreement was reached early in negotiations on Article
21 6.3--Teachers Evaluations and Article 7.2.--Working Conditions.
22 (Testimony of Renee Boisseau, tape 1.)

23 7. On April 5, 1994 the school board first considered
24 language which provided that wage and benefit increases would not
25 be granted after the expiration of the collective bargaining
26 agreement without the written consent of the parties. Association
27 officers Renee Boisseau and Mickey Hammond were in attendance at
28 the meeting. (Exhibit J-4, Testimony of Stephen Foster, tape 3).

1 8. The May 2, 1994, school board proposal included the
2 following under Section 10.2:

3 "This agreement shall be in effect upon ratification of the
4 Board of Trustees, once it has been ratified by the SVTA, and
5 shall remain in effect until June 30, 1995. No increases in
benefits or salary shall be provided without proper written
approval of the parties." (emphasis added)

6 The proposal was made in response to the SVTA's contentions that
7 teachers are entitled to automatic step and lane increases pursuant
8 to Forsyth Education Association v. Rosebud County School District
9 No. 4, ULP # 37-81 and the decision in Forsyth School District No.
10 4 v. Board of Personnel Appeals, 214 Mont. 361, 692 P.2d 1261
11 (1984). (Exhibits 6 & 7; Testimony Stephen Foster)

12 9. The purpose of the above language, which was subsequently
13 incorporated into Article 10.1, was explained to the SVTA at the
14 bargaining table, as the school board did not concur with the
15 holding in the Forsyth case. (Exhibits 6 and 7; Testimony of
16 Stephen Foster, tape 3; Testimony of Renee Boisseau, tape 2.)

17 10. On the May 2, 1994, negotiation meeting, the school board
18 made a conditional offer that would be withdrawn if not accepted
19 within one week. Subsequently, the May 9, 1994 meeting was held,
20 and the Minutes of Negotiation Committee read in part:

21 ...Sherry Svennungsen asked where the board is moving toward
22 negotiations, and if the community doesn't want to jeopardize
23 losing teachers can they address the issue. Stephen Foster
24 stated that he couldn't address these issues as him (sic) and
Mr. LaVanway were only a negotiation committee and not a
Board.

25 Mark Gronley asked what happens if negotiations are not done
26 by June 30. Mr. Foster stated that contracts would be issued
27 at 1993-94 salary and negotiations would continue. Renee
Boisseau stated the (sic) Board is legally bound to working
conditions and salary until new contract is negotiated, the
teachers could not be denied steps and lanes.

1 Sherry Svennungsen stated that asking the teachers to give up
2 steps and lanes, we are asking them to for our childrens'
education....

3 ...

4 Renee Boisseau stated that the SVTA rejected last weeks
5 proposal from the Board concerning salary, benefits and
6 section 10.1. Ms. Boisseau asked if the Board is reoffering
a two year freeze. Steve Foster said he was assuming that was
correct....

7 (Exhibits 6 and 7; Testimony of Stephen Foster, tape 3).

8 11. During the May 19, 1994 Special Meeting of the school
9 board, it reported in the minutes on "Negotiation Discussion and
10 Preparation" as follows:

11 Stephen Foster reported on the last negotiations meeting. The
12 SVTA did not accept sections 10.1 or 8.5 or the salary/benefit
13 proposal. Mr. Foster recommended to the board to consider
14 going back to the original offer of a two year freeze as the
last, best and final offer, with the exception of honoring all
lane movement for the 1994-95 school year, but not for 1995-
96.

15 Motion: Tammy Stremel moved to offer the SVTA the May 2,
16 proposal with the following exceptions: 1) a two year freeze
17 in step and lane movements, honoring all lane movements for
people who notify the board by June 1. 2) additional change
to section 10.1 date should be June 30, 1996. This offer
would be the Board's last, best and final offer...

18
19 (Exhibit J-4)

20 12. During a "Special Meeting" on June 6, 1994, the parties
21 continued contract negotiations. At the meeting, the school board
22 stated that it appeared appropriate to call in a mediator, and that
23 the SVTA could notify them at any time the teachers determined they
24 could bring a proposal closer to that presented by the school
25 board. SVTA commented that the petition to overrule the Forsyth
26 rights has not been heard, therefore, the Forsyth rights are in
27 place and the District must proceed with the contract that is in
28 place. SVTA asserted that "the District is still bound to honor

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1 working conditions including steps and lanes." The Smith Valley
2 School Board then prepared its "last, best and final" proposal
3 dated June 6, 1994, which reads in part:

4 ARTICLE XI SALARY

5 11.5 - Salary Schedule Placement-

6 Placement on the salary schedule will be done on the basis of
7 educational and teaching experience. All teachers shall be
8 granted credit for up to five years of prior teaching
9 experience. All credits accepted for Montana teacher
10 certification or renewal thereof, and which have been approved
11 by the district administrator shall be used for salary
12 schedule placement and movement purposes. These credits shall
13 not be limited to graduate level. Teachers will notify the
14 Board in writing by June 1st if they intend to acquire enough
15 credits for movement on the salary schedule for the ensuing
16 school year.

12 Salary and Insurance Proposal-

13 The Board is proposing a two year freeze in salary, steps,
14 lanes, and benefits. The Board will honor all lane movement
15 for 1994-95, for parties that have notified the Board by June
16 1, 1994. (10.4)

16 11.4 Insurance

17 The Board agrees to pay \$3,000.00 per teacher during the 1994-
18 95 and 1995-96 school years.

18 Section 10.1 Effective Period -

19 This agreement shall be in effect upon ratification of the
20 Board of Trustees, once it has been ratified by the SVTA, and
21 shall remain in effect until June 30, 1996. No increases in
22 benefits or salary shall be provided without proper written
23 approval of the parties.

22 (Emphasis added) (Exhibit No. 8)

23 13. On June 9, 1994, SVTA notified the school board that it
24 was rejecting the June 6, 1994 offer. That letter reads in part:

25 The Smith Valley Teachers Association has viewed and discussed
26 the June 6, 1994 last, best and final proposal submitted by
27 the Board. At this time the Smith Valley Teachers Association
28 cannot accept this proposal as it currently reads concerning
29 sections 8.5 - Professional Leave and article XI salary.

1 The Smith Valley Teachers Association also notes that the
2 Board of Trustees is considering mediation concerning
negotiations as stated at the June 6, 1994 meeting....

3 (Exhibit No. 18)

4 14. On June 20, 1994, the school board requested mediation
5 services from the Board of Personnel Appeals, as the trustees
6 believed they were at bargaining impasse. In the request, the
7 school board indicated that parties were deadlocked over salary and
8 other terms and conditions of employment for the 1994-95 school
9 year. (Exhibit J-4; Testimony of Tammy Stremel, tape 4)

10 15. The record does not reflect that substantial negotiations
11 took place between the parties during the summer of 1994. When
12 school resumed in the fall, the teachers were paid the same salary
13 as they received the previous year with no increases in steps or
14 lanes. And the Smith Valley School District (District) has not
15 paid teachers step increases for the 1994-95 school year.
16 (Testimony of Renee Boisseau, tape 1; Testimony of Stephen Foster,
17 tape 3)

18 16. On September 7, 1994, the District was served a Summons
19 by the Department informing them that the SVTA had filed an Unfair
20 Labor Practice action with the Board of Personnel Appeals in regard
21 to the dispute. (Exhibit J-3)

22 17. Ultimately, a mediation session was held in September or
23 October 1994, but without success. Subsequently, the school board
24 requested a resumption of bargaining on December 5, 1994, and the
25 SVTA agreed to the meeting. (Exhibits 20 & 21; Testimony Renee
26 Boisseau, tape 2)

1 18. On December 5, 1994, a "Special Meeting" was held between BUREAU
2 the parties for bargaining purposes which was recorded in part as
3 follows:

4 ...

5 5. TEACHERS CONTRACT NEGOTIATIONS

6 After a lengthy discussion the board proposed to offer the
7 SVTA an amended proposal dated 12-5-94, stating a one year
8 freeze on salary and benefits (instead of two), provided that
the SVTA would drop the current Unfair Labor Practice suit,
and with the stipulation that the SVTA must respond within one
week...

9 MOTION: Move to offer SVTA a one year freeze on salary and
benefits, providing the SVTA would drop the Unfair Labor
Practice suit and with the stipulation that the SVTA has 10
10 days to reply. If there is no response, a meeting would be
scheduled to discuss any future proposal...

11 ...

12 It was the consensus of the SVTA that there was no difference
13 in the proposal except for the language in Section 10.1
regarding dropping the lawsuit. The SVTA rejected a similar
14 offer on May 2, 1994, and rejected the above offer. Steps and
lanes were negotiated in 91-92 contract, and awarded in 92-93.
15 Teachers worked 93-94 in good faith, performing duties set
forth in the 91-92 contract. SVTA feels that the Board is
16 picking and choosing certain points of the contract to honor,
and that the board continues to spend money on other things
instead of their teachers. It was discussed that the general
17 fund is up \$25,000.00 from the previous year and that the
Board underexpended the 93-94 budget by \$11,000.00. Total
18 cost of steps and lanes for 93-94 is \$8,500.00. The SVTA
feels that they haven't seen any movement from the board to
19 honor teacher's commitment, dedication and years of service.

20 MOTION: Move to settle a two year contract with a flat
increase of \$2600 to be divided among the certificated staff
21 to satisfy alleged contractual obligations for steps and lanes
from 93-94. In addition the board proposes a specified
22 increase in salary the second year if a proposed operating
levy is approved by the voters and with Section 10.1 as
23 amended....Motion carried.

24 SVTA feels that levy should be kept separate from
negotiations. The SVTA asked the Board to go through the
25 budget and confirm that all of the money is budgeted properly.
The current proposal would break the salary schedule now in
26 place. The SVTA thanked the board for the forward movement.
(Emphasis added)

27 ...

28 The SVTA would like to take the current proposal back to the
teachers. They would like to meet again on January 9, 1995...

(Exhibit 22; Testimony of Renee Boisseau, tape 2.)

19. Following the December 5th negotiations, the school board presented the SVTA with another proposal which appeared to be identical to the "last, best and final" proposal from June, 1994. Subsequently, the school board presented a third proposal which offered a one-year contract, a waiver of Forsyth ruling, a freeze in salary, steps, lanes and benefits, and a requirement that the SVTA dismiss the unfair labor practice charge. The SVTA rejected the proposal. (Exhibits 9 & 10)

20. Additionally, on December 7, 1994, the school board memorialized certain changes discussed in its December 5, 1994, meeting in a "Last, Best And Final Proposal" with all changes from previous proposals noted in italics. Pertinent parts read as follow:

Section 10.1 - Effective Period

This agreement shall be in effect upon ratification of the Board of Trustees, once it has been ratified by the SVTA, and shall remain in effect until June 30, 1995. No increases in benefits or salary shall be provided without proper written approval of the parties. If a settlement is reached, the SVTA must be willing to withdraw its Unfair Labor Practice charge. If a settlement is not reached, the Board will proceed with a pre-hearing conference on the charge scheduled for January 25, 1995.

Section 11.4 - Salary and Insurance Proposal

The Board agrees to pay \$3,000.00 per teacher during the 1994-95 school year. The Board is proposing to settle (sic) a two year contract with a flat increase of \$2,600 to be divided among certificated staff to satisfy alleged contractual obligations for steps and lanes from 1993-94. In addition, the Board proposes a specified increase in salary the second year if a proposed operating levy is approved by the voters. This proposal also includes Section 10.1 as amended.

(Exhibit 23)

21. As noted above, beginning on December 5, 1994 the board made a series of economic offers that were progressively more costly to the district. The first offer to the 12 members of the bargaining unit amounted to \$2600 for the 1994-95 school year. (Exhibits 22 and 23; Testimony of Tammy Stremel, tape 3).

22. In January, 1995, the board offered a conditional contract proposal for the 1994-95 contract year which would provide payments to tax sheltered savings accounts for teachers in the amount of \$5,075. This offer was made after a review of district finances revealed additional unencumbered funds. (Exhibit 11: Testimony of Tammy Stremel, tape 3).

23. On January 9, 1995, the SVTA made the following proposal to the school board which reads in part:

The SVTA proposes a two year contract with steps and lanes with a 1.4% increase on the base the 1st year and a 1.4% increase on the base the 2nd year. This would be a \$4000.00 increase over steps and lanes already owed from the 1992-1994 contract.

1994-95 school year insurance freeze with a \$50.00 per teacher increase in insurance for the 1995-96 school year.

Article X

Section 10.1

This agreement shall be in effect upon ratification of the Board of Trustees, once it has been ratified by the SVTA, and shall remain in effect until June 30, 1996...

The SVTA also looked at possible areas in the budget that could be reduced.

(Exhibit 24)

24. On February 7, 1995, the District held a "Special Meeting" and the Minutes read in pertinent part:

. . . .

5. TEACHER CONTRACT NEGOTIATIONS

Negotiations were opened at 7:00 p.m.. At the last negotiation meeting the Board proposed to offer the SVTA an amount of \$5,075 to be placed in a TSA account as follows: Eleven tenured teachers to receive \$425.00, two non-tenured teachers to receive \$200.00 each. Negotiations resumed with the response from the SVTA to not accept the offer.

The SVTA said that although they rejected this offer, they intend to continue to engage in meaningful negotiations, and wish to work with the Board. The SVTA presented the board with several areas in question in the budget and asked the board to examine the budget carefully. The SVTA provided several line items as examples as to where money could possible (sic) be taken from to provide settlement.

The SVTA again asked the board if its intent was to settle. Mr. Dunk stated that the board would like to settle. He feels that this matter is having a detrimental effect on the staff, students, and community.

After a short caucus, the Board stated that at this time they feel they have explored the possible avenues presented by the SVTA, however, the negotiation committee would like to meet with the full board to see if more money can be stripped from the budget...

(Exhibit 25)

25. On February 13, 1995, the school board voted to request fact finding in an attempt to obtain the opinion of a neutral third party. This motion was subsequently rescinded because of cost concerns. (Exhibits 26; Testimony of Tammy Stremel, tape 4).

26. On February 23, 1995, a "Special Board Meeting" was held wherein Chairperson Tammy Stremel recommended that in the best interest of the district, they should settle the current year (1995) contract. As a result of the meeting, the school board made motion: "In favor of offering a one year contract for 1994-95 with steps and lanes, no language changes...."

(Exhibit 27).

27. Subsequently, the board offered the Association a one year contract in which each eligible teacher would receive step and lane increases for the 1994-95 school year. This offer would cost

1 the district between \$9,000 and \$10,000. (Exhibit 12; Testimony of
2 Renee Boisseau, tape 2; Testimony of Tammy Stremel, tape 4).

3 28. The Association rejected this offer and made a counter-
4 offer on April 1, 1995 that was identical to the board's offer with
5 the exception of three sentences in Article 10.1. The first
6 sentence addressed the waiver of any entitlement to automatic wage
7 increases after the expiration of the agreement. The latter two
8 sentences concerned the unfair labor practice charge pending before
9 the Board of Personnel Appeals. The SVTA inferred during
10 discussions that the ULP charge would be moot once agreement was
11 reached by the parties. (Exhibit 28; Testimony of Renee Boisseau,
12 tape 2.)

13 29. On April 7, 1995, the school board met to consider the
14 Association's counter-offer. The board rejected the offer and
15 reaffirmed its prior offer of February 23, 1995. (Testimony of
16 Stephen Foster, tape 3; Testimony of Tammy Stremel, tape 4).

17 30. During negotiations in this dispute, the board and the
18 Association met a total of 16 times (certain substantive and
19 pertinent meetings and proposals mentioned above) in an attempt to
20 settle the contract in question. At no time did either party
21 unreasonably refuse to meet for collective bargaining in this
22 matter, and both parties remain willing to meet to reach a
23 settlement of the matter. The school board never implemented any
24 of the provisions of its rejected offers and never refused to
25 bargain with the Association unless the unfair labor practice
26 charge was withdrawn. Furthermore, the Association's chief
27 negotiator acknowledged that it was her intent to withdraw the
28 charge if a settlement was reached. (Testimony of Renee Boisseau,

1 tape 2; Testimony of Stephen Foster, tape 3; Testimony of Tammy
2 Stremel, tape 4).

3 31. As pointed out by the school board, the SVTA never
4 requested mediation, fact finding or binding arbitration of the
5 dispute. Nor did the SVTA ever ask the school board to implement
6 those provisions on which tentative agreement was reached.
7 (Testimony of Renee Boisseau, tape 2).

8 IV. CONCLUSIONS OF LAW

9 1. The Montana Supreme Court has approved the use of federal
10 court and National Labor Relations Board decisions as precedent
11 when interpreting the Montana Public Employees Collective
12 Bargaining Act. City of Great Falls v. Young, 211 Mont. 13, 686
13 P.2d 185, 119 LRRM 2682 (1984). Pursuant to Section 39-31-406,
14 MCA, the Court has also held that a Complainant's case must be
15 established by a preponderance of the evidence. Board of Trustees
16 v. State of Montana, 185 Mont. 89, 604 P.2d 770, 103 LRRM 3090
17 (1979).

18 2. In addition, the Montana Board of Personnel Appeals has
19 adopted the totality of conduct standard when deciding whether or
20 not a Defendant has failed to bargain in good faith. MPEA v. City
21 of Great Falls, ULP 19-85 (July 28, 1986); Montana Education
22 Association v. Laurel School District Nos. 17 and 7-70, ULP 40-93
23 (February, 1995).

24 3. The duty to bargain in good faith is outlined in Volume
25 1, Patrick Hardin, Charles J. Morris, Developing Labor Law, pages
26 608-610 (1992) as follows:

27 [The duty to bargain in good faith is an obligation ... to
28 participate actively in the deliberations so as to indicate a
present intention to find a basis for agreement...." This implies
both "an open mind and a sincere desire to reach an agreement" as

1 well as "a sincere effort ... to reach a common ground." The
2 presence or absence of intent "must be discerned from the record."
3 Except in cases where the conduct fails to meet the minimum
4 obligation imposed by law or constitutes an outright refusal to
5 bargain, relevant facts of a case must be studied to determine
6 whether the employer or the union is bargaining in good or bad
7 faith. The "totality of conduct" is the standard by which the
8 "quality" of negotiations is tested. Thus, even though some
9 specific actions, viewed alone, might not support a charge of bad-
10 faith bargaining, a party's overall course of conduct in
11 negotiations may reveal a violation of the Act].

12 4. It is clear that the Board considers the entire course of
13 conduct in bargaining, and will not necessarily view isolated
14 misconduct as a failure to bargain in good faith. Thus, an
15 employer's withdrawal of tentative agreements, standing alone, does
16 not constitute bad faith in contravention of the bargaining
17 obligation. Respondent points out that in Roman Iron Works, as
18 cited and outlined in Volume 1, Patrick Hardin, Charles J. Morris,
19 Developing Labor Law, pages 608-610 (1992), "the employer violated
20 section 8(a)(5) by its unilateral wage increase during
21 negotiations. The employer also engaged in hard bargaining
22 including a reduction of the wage offer during bargaining, denial
23 of a union request for employee addresses, insistence on a right to
24 subcontract, and a demand for significant cost reductions.
25 However, the Board found that the employer met frequently with the
26 union, made complete contract proposals, and made several
27 significant concessions. Under all of these circumstances, the
28 Board found that the employer did not engage in bad-faith
29 bargaining." [citations omitted].

30 SURFACE OR REGRESSIVE BARGAINING

31 5. SVTA contends that the Smith Valley School Board has
32 committed an unfair labor practice through surface bargaining. As
33 contended by Respondent, however, it was the school board which

1 initiated the request to begin negotiations. And, when the school
2 board thought the parties had reached apparent impasse, it was the
3 school board that made a unilateral request for mediation and
4 requested fact finding in order to resolve this dispute.

5 Moreover, the record reflects that neither of the parties were
6 uncooperative in their attempts to set and hold settlement
7 conferences. Neither party refused to meet, and that the school
8 board met approximately 16 times with the Association in an attempt
9 to settle the contract. The record further shows that the school
10 board made a sincere effort to find money within its budget to fund
11 step and lane increases for the 1994-95 school year, and on
12 February 23, 1995, it made an offer to do so.

13 6. More importantly, instead of immediately implementing its
14 rejected offers, the school board continued to meet and to make
15 offers to the Association. The Association, however, never
16 requested the school board to implement any of its proposals.
17 SVTA's allegations that the school board was engaged in surface
18 bargaining is clearly not supported by the record in this matter.

19 7. With regard to SVTA's claim that the withdrawal of the
20 May 2, 1994 offer constitutes regressive bargaining, as argued by
21 the school board, the Board of Personnel Appeals has held that:
22 "[E]ither party may retract an offer not accepted and revert to a
23 lower offer without being guilty of bad faith bargaining. . . ."
24 AFSCME v. State of Montana, ULP 11-79 (April 3, 1982). When the
25 one year wage freeze offer of May 2 was communicated to the SVTA,
26 it was clearly stated that the offer would be withdrawn if not
27 accepted. That the school board subsequently reinstated its
28 previous offer appears to be that of "hard bargaining," as

1 demonstrated by the parties throughout the collective bargaining
2 process. Contrary to SVTA's contentions, such lower offer did not
3 reach the level of an unfair labor practice act when it actually
4 reinstated its previous offer on May 9, 1994.

5 Under the totality of conduct standard, the record reflects
6 that the school board has not engaged in surface or regressive
7 bargaining tactics. MPEA v. City of Great Falls, ULP 19-85 (July,
8 1986 and Montana Education Association v. Laurel School District
9 Nos. 17 and 7-70, ULP 40-93 (February, 1995).

10 **CONDITION PRECEDENT - THE WITHDRAWAL OF AN UNFAIR LABOR**
11 **PRACTICE CHARGE**

12 8. It is well established that a party may not bargain to
13 impasse over an illegal or permissive subject of bargaining. In
14 affirming the NLRB, however, the Supreme Court also clarified its
15 ruling to reflect that bargaining need not be confined to the
16 statutory subjects. NLRB v. Borg Warner, 356 U.S. 342 (1958), 42
17 LRRM 2034. Thus, the NLRB has held that a party violates the NLRA
18 when it demands that an unfair labor practice charge against it be
19 withdrawn as a condition to agreement. Stackpole Components Co.,
20 232 NLRB 723. 96 LRRM 1324 (1977).

21 9. As contended by the school board, however, it is also
22 well established that the mere request by one party that the other
23 party withdraw an unfair labor practice charge does not violate the
24 law. In Inner City Broadcasting Corp., 270 NLRB 1230 (1984), the
25 NLRB held: "[E]ven assuming that Respondent's comments could be
26 considered that, as a condition precedent to the reaching of an
27 agreement, the Union withdrew its charge and arbitration demands,
28 such a proposal is not per se illegal. However, Respondent could

1 not legally insist to impasse on its acceptance in the face of a
2 clear and expressed refusal by the Union to bargain about the [non-
3 mandatory subjects]" Id. at 1223. A similar result was reached in
4 Carlsen Porsche Audi, Inc., 266 NLRB 141 (1983).

5 10. The above mentioned cases establish the proposition that
6 one party may request the other to withdraw an unfair labor
7 practice charge as a condition for settlement, but may not bargain
8 to impasse on the request. Here, however, the school board did
9 not bargain to impasse on this issue because SVTA admitted at the
10 hearing that they intended to withdraw the charges in the event of
11 a settlement. Moreover, the record in this matter indicates that
12 the school board's request to withdraw the unfair labor practice
13 charge did not unreasonably restrain or inhibit the bargaining
14 process between parties. As contended by the board, the record
15 does not reflect the board has conditioned its willingness to meet
16 on the withdrawal of the charge, and the SVTA never objected to
17 such request as a permissive subject over which it would not
18 bargain.

19 11. As pointed out by SVTA in its argument, the overall
20 record indicates that the main sticking point in these negotiations
21 has never been the board's request to drop the unfair labor
22 practice charge. It has been the school board's insistence and the
23 Association's rejection of language which would waive a teacher's
24 step and lane increases after a collective bargaining agreement
25 expires pursuant to the Forsyth case (discussion follows) that
26 deadlocked the parties.

27 12. Clearly, steps and lanes are mandatory subjects for
28 bargaining, therefore, it appears that the board has the right to

1 insist on this language. And, the SVTA has the right to reject it.
2 In so doing, neither party is guilty of a refusal to bargain in
3 good faith.

4 13. In Forsyth Education Association v. Rosebud County School
5 District No. 14, ULP 37-81 (1983) and Lolo Education Association v.
6 Missoula County School District No. 7, ULP 29-86 (1987), the
7 Montana Board of Personnel Appeals held that a school district
8 commits an unfair labor practice when it withholds an experience
9 step under the terms of an expired collective bargaining agreement
10 in the absence of a bargaining impasse.

11 14. The rule announced in Forsyth was derived from the
12 unilateral change doctrine first announced by the United States
13 Supreme Court in NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962).
14 In that case, the Court affirmed the rule that it is an unfair
15 labor practice for an employer to make a unilateral change in any
16 term or condition of employment following the expiration of a
17 collective bargaining agreement without first bargaining to
18 impasse. The Court reasoned that unilateral changes are unlawful
19 because they frustrate the "statutory objective of establishing
20 working conditions through bargaining." Id. at 744. In that case,
21 the employer imposed a wage increase during the course of
22 negotiations.

23 IMPASSE INTERPRETED

24 15. The Board of Personnel Appeals (BPA) adopted a definition
25 of impasse in Bigfork Area Education Association v. Board of
26 Flathead and Lake County School District No. 38, ULP #20-78 (1979).
27 In that case, the BPA cited an NLRB holding in Taft Broadcasting
28 Company, 163 NLRB 475, 478, 64 LRRM 1386 (1967) to define a

1 bargaining impasse as a "deadlock reached by bargaining parties
2 'after good faith negotiations have exhausted the prospects of
3 concluding an agreement.'"

4 In applying this definition, BPA held that it must consider
5 the "bargaining history, the good faith of the parties in
6 negotiations, the length of the negotiations, the importance of the
7 issue or issues as to which there is disagreement, [and] the
8 contemporaneous understanding of the parties as to the state of
9 negotiations. . . ." before determining if a bona fide impasse
10 permits an employer to implement a unilateral change in a mandatory
11 subject of bargaining.

12 16. As the U.S. Supreme Court found in NLRB v. Borg-Warner
13 Corp., Wooster Div., 356 US 342, 352, 42 LRRM 2034 (1958), some
14 difficulty exists in establishing the "inherently vague and fluid
15 ... standard" applicable to an impasse reached by hard and
16 steadfast bargaining, as distinguished from one resulting from an
17 unlawful refusal to bargain. And, the NLRB found that in
18 collective bargaining "part of the difficulty arises from the fact
19 that the law recognizes the possibility of the parties reaching an
20 impasse." (40 LRRM 98, 105-6 (1957))

21 17. The difficulty of applying this definition has caused
22 some of our federal courts to reject the impasse standard. In NLRB
23 v. Citizens Hotel, 326 F.2d 501, 55 LRRM 2135 (5th Cir. 1964), for
24 example, the Fifth Circuit Court of Appeals held: "[A]n employer
25 may make changes without the approval of the union as the
26 bargaining agent. The union has no absolute veto power under the
27 Act. Nor do negotiations necessarily have to exhaust themselves to
28 the point of the so-called impasse." Id. at 2137.

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1 18. Here too, as contended by Respondent, on the surface it
2 is difficult to know whether parties were deadlocked and in true
3 impasse. The overall record clearly indicates, however, that Smith
4 Valley trustees honestly believed that they were at impasse by the
5 end of May, 1994, even to the extent they requested mediation on
6 June 20, 1994. However, subsequent bargaining developments show
7 further progress in negotiations (Finding of Fact No. 29).

8 19. As the Board of Personnel Appeals stated in Forsyth,
9 "This decision by the BPA is not as onerous as suggested by the
10 school district and amici curiae. That is so for the reason that
11 if during negotiations impasse occurs, then the employer is free to
12 unilaterally implement its last, best, final offer." (Emphasis
13 added) Forsyth Education Association v. Rosebud County School
14 District #14, 2 Ed Law 230, 242 (1983). As the facts of this case
15 make clear, however, impasse did not occur prior to the expiration
16 of the current contract and the district was obligated to pay steps
17 and lanes as provided in the agreement.

18 20. Furthermore, as contended by the school board, given the
19 reduction in the district's budget, it is understandable why the
20 school board would ask for such a provision as a condition for
21 settlement. And, making this request less than two months after
22 the beginning of negotiations does not constitute a failure to
23 bargain in good faith. Moreover, consistent with the Court's
24 pronouncement in Katz, the Montana Public Employees Collective
25 Bargaining Act was adopted to encourage public employers and
26 employee unions to determine the terms and conditions of employment
27 at the bargaining table. Clearly, the bargaining history herein
28 reflects both SVTA and the board made good faith efforts to resolve

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STANDARD
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BUREAU

1 the dispute over this very important language issue. NLRB v. Katz,
2 369 U.S. 736 (1962).

3 21. Here, the school board essentially argues that Forsyth
4 should be overturned, and SVTA argues it is controlling and must
5 stand. The parties have provided citation to and discussion of a
6 number of cases supporting their contentions on that matter. In
7 this case, however, as before concluded from the facts, all of the
8 factors (Length of Negotiations; Good Faith of Parties; Importance
9 of the Issue; Contemporary Understanding) indicate that impasse had
10 not been reached. The parties were not at impasse as of the date
11 of the filing of Unfair Labor Practice No. 61-94.

12 22. In the absence of impasse in this matter, as contended by
13 the SVTA, the Hearing Officer is bound by precedent established by
14 the Board of Personnel Appeals for whom he is conducting the
15 hearing. Clearly, Forsyth sets forth precedent that must be
16 followed by the Department of Labor and Industry. Certainly, the
17 Hearing Officer in this matter has no authority to reverse
18 established principles of law or to reverse a decision of the
19 Montana Supreme Court.

20 23. Furthermore, as pointed out by the SVTA, the school board
21 provided no citations to any authority holding that the Hearing
22 Officer has such power to overturn the Board. Moreover, in Chester
23 School District No. 33, et. al v. Montana Education Association
24 et. al, Declaratory Ruling No. 1-94, the School District asked the
25 Board to revisit the Forsyth holding and the Board declined to do
26 so. SVTA also points out that House Bill 264 was introduced in the
27 recently completed legislature to overturn Forsyth and ultimately
28 failed.

24. Here, having concluded the parties are not at impasse, Forsyth is controlling. In Forsyth the Montana Supreme Court held in part:

While the appellant School district argued the BPA had ordered it to automatically grant teachers' wage increases under the terms of the expired contract, we find no such ruling by the BPA in its order. It simply ordered that, in the absence of an "impasse," the provisions of the expired contract may not be unilaterally changed by the employer.

Id. at 365 (Emphasis added)

25. Based on the overall record, Smith Valley School District violated MCA 39-31-401(1) and (5), MCA.

ORDER

Smith Valley School District has violated MCA 39-31-401(1) and (5) and is hereby ordered to negotiate with the Association as required by the Act. It is further ordered that the District pay backpay based on the terms of the expired agreement to each teacher of the District.

DATED this 15th day of December, 1995.

BOARD OF PERSONNEL APPEALS

By Willis M. McKeon
WILLIS M. MCKEON
PRESIDING OFFICER

Board members Foley and Schneider concur.

Board members Talcott and Hagan dissent.

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 61-94:

SMITH VALLEY TEACHERS
ASSOCIATION, MEA/NEA,

Complainant,

vs.

SMITH VALLEY ELEMENTARY SCHOOL
DISTRICT NO. 89, FLATHEAD COUNTY,

Defendant.

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
ORDER

* * * * *

I. INTRODUCTION

An in-person hearing on the above matter was held on April 12, 1995, in Kalispell, Montana before Gordon D. Bruce, duly appointed Hearing Officer of the Department of Labor and Industry. The Complainant was represented by its counsel, Karl J. Englund. Defendant was represented by its counsel, Michael Dahlem. Witnesses Renee Boisseau, Stephen Foster and Tammy Strenel gave sworn testimony at the hearing. Subsequent to the close of hearing, parties filed their post-hearing briefs with the Hearing Officer and final briefs were filed on May 25, 1995.

II. ISSUE

Whether the Smith Valley Elementary School District No. 89, Flathead County, Montana violated Section 39-31-402 (1) and (5), MCA.

III. FINDINGS OF FACT

1. As a result of a reduction of 4.5% in State funding for Smith Valley Elementary School District No. 89 for the 1994-95 school year the school board (the "school board") was prompted to

1 propose a wage and benefit freeze in negotiations with the Smith
2 Valley Teachers Association (SVTA) as a means to control its costs.
3 (Testimony of Stephen Foster, tape 3).

4 2. Ultimately the school board first contacted the SVTA on
5 January 18, 1994 to request the commencement of 1994-95
6 negotiations on January 27, 1994. The SVTA proposed March 7, 1994,
7 as the date for the opening session and rejected the board's
8 proposal for an earlier session, noting that negotiations
9 traditionally began around the first of April. When this request
10 was rejected, the board again requested a negotiation date on
11 January 27, 1994. (Exhibit J-4)

12 3. Subsequently, on February 17, 1994, the school board
13 communicated its first offer to the Association through the mail.
14 The proposal called for a two year freeze in teacher salaries,
15 steps (experience), lanes (education) and the district's health
16 insurance contribution. (Exhibits J-4 and 14; Testimony of Stephen
17 Foster, tape 3).

18 4. By agreement of SVTA and the school board, the first
19 negotiation session took place on March 7, 1994. Ground rules were
20 adopted on March 21, 1994. Nothing in the ground rules limited the
21 parties' right to introduce new proposals during the course of
22 negotiations. (Exhibit 17, Testimony of Renee Boisseau, tape 2).

23 5. The SVTA's first wage proposal was made approximately
24 March 21, 1994. At this third session, SVTA called for an increase
25 of approximately 4% in the base salary, step and lane increases for
26 the 1994-95 and the 1995-96 school years and an increase in the
27 district's contribution for health insurance for the 1995-96 school
28 year. The district estimated the cost of the proposal at about

1 \$60,000. (Exhibit 16; Testimony of Renee B, tape 2; Stephen
2 Foster, tape 3).

3 6. Agreement was reached early in negotiations on Article
4 6.3--Teachers Evaluations and Article 7.2.--Working Conditions.
5 (Testimony of Renee Boisseau, tape 1.)

6 7. On April 5, 1994 the school board first considered
7 language which provided that wage and benefit increases would not
8 be granted after the expiration of the collective bargaining
9 agreement without the written consent of the parties. Association
10 officers Renee Boisseau and Mickey Hammond were in attendance at
11 the meeting. (Exhibit J-4, Testimony of Stephen Foster, tape 3).

12 8. The May 2, 1994, school board proposal included the
13 following under Section 10.2:

14 "This agreement shall be in effect upon ratification of the
15 Board of Trustees, once it has been ratified by the SVTA, and
16 shall remain in effect until June 30, 1995. No increases in
benefits or salary shall be provided without proper written
approval of the parties." (emphasis added)

17 The proposal was made in response to the SVTA's contentions that
18 teachers are entitled to automatic step and lane increases pursuant
19 to Forsyth Education Association v. Rosebud County School District
20 No. 4, ULP # 37-81 and the decision in Forsyth School District No.
21 4 v. Board of Personnel Appeals, 214 Mont. 361, 692 P.2d 1261
22 (1984). (Exhibits 6 & 7; Testimony Stephen Foster)

23 9. The purpose of the above language, which was subsequently
24 incorporated into Article 10.1, was explained to the SVTA at the
25 bargaining table, as the school board did not concur with the
26 holding in the Forsyth case. (Exhibits 6 and 7; Testimony of
27 Stephen Foster, tape 3; Testimony of Renee Boisseau, tape 2.)
28

1 10. On the May 2, 1994, negotiation meeting, the school board
2 made a conditional offer that would be withdrawn if not accepted
3 within one week. Subsequently, the May 9, 1994 meeting was held,
4 and the Minutes of Negotiation Committee read in part:

5 ...Sherry Svennungsen asked where the board is moving toward
6 negotiations, and if the community doesn't want to jeopardize
7 losing teachers can they address the issue. Stephen Foster
8 stated that he couldn't address those issues as him (sic) and
9 Mr. LaVanway were only a negotiation committee and not a
10 Board.

11 Mark Gronley asked what happens if negotiations are not done
12 by June 30. Mr. Foster stated that contracts would be issued
13 at 1993-94 salary and negotiations would continue. Renee
14 Boisseau stated the (sic) Board is legally bound to working
15 conditions and salary until new contract is negotiated, the
16 teachers could not be denied steps and lanes.

17 Sherry Svennungsen stated that asking the teachers to give up
18 steps and lanes, we are asking them to for our childrens
19 education....

20 ...

21 Renee Boisseau stated that the SVTA rejected last weeks
22 proposal from the Board concerning salary, benefits and
23 section 10.1. Ms. Boisseau asked if the Board is reoffering
24 a two year freeze. Steve Foster said he was assuming that was
25 correct....

26 (Exhibits 6 and 7; Testimony of Stephen Foster, tape 3).

27 11. During the May 19, 1994 Special Meeting of the school
28 board, it reported in the minutes on "Negotiation Discussion and
29 Preparation" as follows:

30 Stephen Foster reported on the last negotiations meeting. The
31 SVTA did not accept sections 10.1 or 8.5 or the salary/benefit
32 proposal. Mr. Foster recommended to the board to consider
33 going back to the original offer of a two year freeze as the
34 last, best and final offer, with the exception of honoring all
35 lane movement for the 1994-95 school year, but not for 1995-
36 96.

37 Motion: Tammy Stremel moved to offer the SVTA the May 2,
38 proposal with the following exceptions: 1) a two year freeze
39 in step and lane movements, honoring all lane movements for
40 people who notify the board by June 1. 2) additional change
41 to section 10.1 date should be June 30, 1996. This offer
42 would be the Board's last, best and final offer...

1 (Exhibit J-4)

2 12. During a "Special Meeting" on June 6, 1994, the parties
3 continued contract negotiations. At the meeting, the school board
4 stated that it appeared appropriate to call in a mediator, and that
5 the SVTA could notify them at any time the teachers determined they
6 could bring a proposal closer to that presented by the school
7 board. SVTA commented that the petition to overrule the Forsyth
8 rights has not been heard, therefore, the Forsyth rights are in
9 place and the District must proceed with the contract that is in
10 place. SVTA asserted that "the District is still bound to honor
11 working conditions including steps and lanes." The Smith Valley
12 School Board then prepared its "last, best and final" proposal
13 dated June 6, 1994, which reads in part:

14 ARTICLE XI SALARY

15 11.5 - Salary Schedule Placement-

16 Placement on the salary schedule will be done on the basis of
17 educational and teaching experience. All teachers shall be
18 granted credit for up to five years of prior teaching
19 experience. All credits accepted for Montana teacher
20 certification or renewal thereof, and which have been approved
21 by the district administrator shall be used for salary
22 schedule placement and movement purposes. These credits shall
23 not be limited to graduate level. Teachers will notify the
24 Board in writing by June 1st if they intend to acquire enough
25 credits for movement on the salary schedule for the ensuing
26 school year.

27 Salary and Insurance Proposal-

28 The Board is proposing a two year freeze in salary, steps,
lanes, and benefits. The Board will honor all lane movement
for 1994-95, for parties that have notified the Board by June
1, 1994. (10.4)

11.4 Insurance

The Board agrees to pay \$3,000.00 per teacher during the 1994-
95 and 1995-96 school years.

Section 10.1 Effective Period -

1 This agreement shall be in effect upon ratification of the
2 Board of Trustees, once it has been ratified by the SVTA, and
3 shall remain in effect until June 30, 1996. No increases in
benefits or salary shall be provided without proper written
approval of the parties.

4 (Emphasis added) (Exhibit No. 8)

5 13. On June 9, 1994, SVTA notified the school board that it
6 was rejecting the June 6, 1994 offer. That letter reads in part:

7 The Smith Valley Teachers Association has viewed and discussed
8 the June 6, 1994 last, best and final proposal submitted by
9 the Board. At this time the Smith Valley Teachers Association
cannot accept this proposal as it currently reads concerning
sections 8.5 - Professional Leave and article XI salary.

10 The Smith Valley Teachers Association also notes that the
11 Board of Trustees is considering mediation concerning
negotiations as stated at the June 6, 1994 meeting....

12 (Exhibit No. 18)

13 14. On June 20, 1994, the school board requested mediation
14 services from the Board of Personnel Appeals, as the trustees
15 believed they were at bargaining impasse. In the request, the
16 school board indicated that parties were deadlocked over salary and
17 other terms and conditions of employment for the 1994-95 school
18 year. (Exhibit J-4; Testimony of Tammy Stremel, tape 4)

19 15. The record does not reflect that substantial negotiations
20 took place between the parties during the summer of 1994. When
21 school resumed in the fall, the teachers were paid the same salary
22 as they received the previous year with no increases in steps or
23 lanes. And the Smith Valley School District (District) has not
24 paid teachers step increases for the 1994-95 school year.
25 (Testimony of Renee Boisseau, tape 1; Testimony of Stephen Foster,
26 tape 3)

27 16. On September 7, 1994, the District was served a Summons
28 by the Department informing them that the SVTA had filed an Unfair

1 Labor Practice action with the Board of Personnel Appeals in regard
2 to the dispute. (Exhibit J-3)

3 17. Ultimately, a mediation session was held in September or
4 October 1994, but without success. Subsequently, the school board
5 requested a resumption of bargaining on December 5, 1994, and the
6 SVTA agreed to the meeting. (Exhibits 20 & 21; Testimony Renee
7 Boisseau, tape 2)

8 18. On December 5, 1994, a "Special Meeting" was held between
9 the parties for bargaining purposes which was recorded in part as
10 follows:

11 ...

12 5. TEACHERS CONTRACT NEGOTIATIONS

13 After a lengthy discussion the board proposed to offer the
14 SVTA an amended proposal dated 12-5-94, stating a one year
15 freeze on salary and benefits (instead of two), provided that
16 the SVTA would drop the current Unfair Labor Practice suit,
17 and with the stipulation that the SVTA must respond within one
18 week...

19 MOTION: Move to offer SVTA a one year freeze on salary and
20 benefits, providing the SVTA would drop the Unfair Labor
21 Practice suit and with the stipulation that the SVTA has 10
22 days to reply. If there is no response, a meeting would be
23 scheduled to discuss any future proposal...

24 ...

25 It was the consensus of the SVTA that there was no difference
26 in the proposal except for the language in Section 10.1
27 regarding dropping the lawsuit. The SVTA rejected a similar
28 offer on May 2, 1994, and rejected the above offer. Steps and
lanes were negotiated in 91-92 contract, and awarded in 92-93.
Teachers worked 93-94 in good faith, performing duties set
forth in the 91-92 contract. SVTA feels that the Board is
picking and choosing certain points of the contract to honor,
and that the board continues to spend money on other things
instead of their teachers. It was discussed that the general
fund is up \$25,000.00 from the previous year and that the
Board underexpended the 93-94 budget by \$11,000.00. Total
cost of steps and lanes for 93-94 is \$8,500.00. The SVTA
feels that they haven't seen any movement from the board to
honor teacher's commitment, dedication and years of service.

29 MOTION: Move to settle a two year contract with a flat
increase of \$2600 to be divided among the certificated staff
to satisfy alleged contractual obligations for steps and lanes
from 93-94. In addition the board proposes a specified

1 increase in salary the second year if a proposed operating
2 levy is approved by the voters and with Section 10.1 as
amended....Motion carried.

3 SVTA feels that levy should be kept separate from
4 negotiations. The SVTA asked the Board to go through the
5 budget and confirm that all of the money is budgeted properly.
6 The current proposal would break the salary schedule now in
place. The SVTA thanked the board for the forward movement.
(Emphasis added)

7 The SVTA would like to take the current proposal back to the
8 teachers. They would like to meet again on January 9, 1995...

9 (Exhibit 22; Testimony of Renee Boisseau, tape 2.)

10 19. Following the December 5th negotiations, the school board
11 presented the SVTA with another proposal which appeared to be
12 identical to the "last, best and final" proposal from June, 1994.
13 Subsequently, the school board presented a third proposal which
14 offered a one-year contract, a waiver of Forsyth ruling, a freeze
15 in salary, steps, lanes and benefits, and a requirement that the
16 SVTA dismiss the unfair labor practice charge. The SVTA rejected
17 the proposal. (Exhibits 9 & 10)

18 20. Additionally, on December 7, 1994, the school board
19 memorialized certain changes discussed in its December 5, 1994,
20 meeting in a "Last, Best And Final Proposal" with all changes from
21 previous proposals noted in italics. Pertinent parts read as
22 follow:

23 Section 10.1 - Effective Period

24 *This agreement shall be in effect upon ratification of the*
25 *Board of Trustees, once it has been ratified by the SVTA, and*
26 *shall remain in effect until June 30, 1995. No increases in*
27 *benefits or salary shall be provided without proper written*
28 *approval of the parties. If a settlement is reached, the SVTA*
must be willing to withdraw its Unfair Labor Practice charge.
If a settlement is not reached, the Board will proceed with a
pre-hearing conference on the charge scheduled for January 25,
1995.

Section 11.4 - Salary and Insurance Proposal

1 The Board agrees to pay \$3,000.00 per teacher during the 1994-
2 95 school year. The Board is proposing to settle (sic) a two
3 year contract with a flat increase of \$2,600 to be divided
4 among certificated staff to satisfy alleged contractual
5 obligations for steps and lanes from 1993-94. In addition,
6 the Board proposes a specified increase in salary the second
7 year if a proposed operating levy is approved by the voters.
8 This proposal also includes Section 10.1 as amended.

9 (Exhibit 23)

10 21. As noted above, beginning on December 5, 1994 the board
11 made a series of economic offers that were progressively more
12 costly to the district. The first offer to the 12 members of the
13 bargaining unit amounted to \$2600 for the 1994-95 school year.
14 (Exhibits 22 and 23; Testimony of Tammy Stremel, tape 3).

15 22. In January, 1995, the board offered a conditional
16 contract proposal for the 1994-95 contract year which would provide
17 payments to tax sheltered savings accounts for teachers in the
18 amount of \$5,075. This offer was made after a review of district
19 finances revealed additional unencumbered funds. (Exhibit 11:
20 Testimony of Tammy Stremel, tape 3).

21 23. On January 9, 1995, the SVTA made the following proposal
22 to the school board which reads in part:

23 The SVTA proposes a two year contract with steps and lanes
24 with a 1.4% increase on the base the 1st year and a 1.4%
25 increase on the base the 2nd year. This would be a \$4000.00
26 increase over steps and lanes already owed from the 1992-1994
27 contract.

28 1994-95 school year insurance freeze with a \$50.00 per teacher
increase in insurance for the 1995-96 school year.

Article X

Section 10.1

This agreement shall be in effect upon ratification of the
Board of Trustees, once it has been ratified by the SVTA, and
shall remain in effect until June 30, 1996...

1 The SVTA also looked at possible areas in the budget that could be
2 reduced.

3 (Exhibit 24)

4 24. On February 7, 1995, the District held a "Special
5 Meeting" and the Minutes read in pertinent part:

6

7 5. TEACHER CONTRACT NEGOTIATIONS

8 Negotiations were opened at 7:00 p.m.. At the last
9 negotiation meeting the Board proposed to offer the SVTA an
10 amount of \$5,075 to be placed in a TSA account as follows:
Eleven tenured teachers to receive \$425.00, two non-tenured
teachers to receive \$200.00 each. Negotiations resumed with
the response from the SVTA to not accept the offer.

11 The SVTA said that although they rejected this offer, they
12 intend to continue to engage in meaningful negotiations, and
13 wish to work with the Board. The SVTA presented the board
14 with several areas in question in the budget and asked the
board to examine the budget carefully. The SVTA provided
several line items as examples as to where money could
possible (sic) be taken from to provide settlement.

15 The SVTA again asked the board if its intent was to settle.
16 Mr. Dunk stated that the board would like to settle. He feels
17 that this matter is having a detrimental effect on the staff,
students, and community.

18 After a short caucus, the Board stated that at this time they
19 feel they have explored the possible avenues presented by the
20 SVTA, however, the negotiation committee would like to meet
with the full board to see if more money can be stripped from
the budget...

21 (Exhibit 25)

22 25. On February 13, 1995, the school board voted to request
23 fact finding in an attempt to obtain the opinion of a neutral third
24 party. This motion was subsequently rescinded because of cost
25 concerns. (Exhibits 26; Testimony of Tammy Stremel, tape 4).

26 26. On February 23, 1995, a "Special Board Meeting" was held
27 wherein Chairperson Tammy Stremel recommended that in the best
28 interest of the district, they should settle the current year

1 (1995) contract. As a result of the meeting, the school board made
2 motion: "In favor of offering a one year contract for 1994-95 with
3 steps and lanes, no language changes...."
4 (Exhibit 27).

5 27. Subsequently, the board offered the Association a one
6 year contract in which each eligible teacher would receive step and
7 lane increases for the 1994-95 school year. This offer would cost
8 the district between \$9,000 and \$10,000. (Exhibit 12; Testimony of
9 Renee Boisseau, tape 2; Testimony of Tammy Stremel, tape 4).

10 28. The Association rejected this offer and made a counter-
11 offer on April 1, 1995 that was identical to the board's offer with
12 the exception of three sentences in Article 10.1. The first
13 sentence addressed the waiver of any entitlement to automatic wage
14 increases after the expiration of the agreement. The latter two
15 sentences concerned the unfair labor practice charge pending before
16 the Board of Personnel Appeals. Essentially, parties remained
17 deadlocked as a result of the Forsyth language, and had been
18 deadlocked on that issue beginning at least in February and March
19 of 1994 as reflected in the school board's minutes, proposals and
20 counter proposals set out in the above facts. And, the SVTA
21 inferred during discussions that the ULP charge would be moot once
22 agreement was reached by the parties. (Exhibit 28; Testimony of
23 Renee Boisseau, tape 2.)

24 29. On April 7, 1995, the school board met to consider the
25 Association's counter-offer. The board rejected the offer and
26 reaffirmed its prior offer of February 23, 1995. (Testimony of
27 Stephen Foster, tape 3; Testimony of Tammy Stremel, tape 4).
28

1 30. During negotiations in this dispute, the board and the
2 Association met a total of 16 times (certain substantive and
3 pertinent meetings and proposals mentioned above) in an attempt to
4 settle the contract in question. At no time did either party
5 unreasonably refuse to meet for collective bargaining in this
6 matter, and both parties remain willing to meet to reach a
7 settlement of the matter. The school board never implemented any
8 of the provisions of its rejected offers and never refused to
9 bargain with the Association unless the unfair labor practice
10 charge was withdrawn. Furthermore, the Association's chief
11 negotiator acknowledged that it was her intent to withdraw the
12 charge if a settlement was reached. (Testimony of Renee Boisseau,
13 tape 2; Testimony of Stephen Foster, tape 3; Testimony of Tammy
14 Stremel, tape 4).

15 31. As pointed out by the school board, the SVTA never
16 requested mediation, fact finding or binding arbitration of the
17 dispute. Nor did the SVTA ever ask the school board to implement
18 those provisions on which tentative agreement was reached.
19 (Testimony of Renee Boisseau, tape 2).

20 IV. CONCLUSIONS OF LAW

21 1. The Montana Supreme Court has approved the use of federal
22 court and National Labor Relations Board decisions as precedent
23 when interpreting the Montana Public Employees Collective
24 Bargaining Act. City of Great Falls v. Young, 211 Mont. 13, 686
25 P.2d 185, 119 LRRM 2682 (1984). Pursuant to Section 39-31-406,
26 MCA, the Court has also held that a Complainant's case must be
27 established by a preponderance of the evidence. Board of Trustees

1 v. State of Montana, 185 Mont. 89, 604 P.2d 770, 103 LRRM 3090
2 (1979).

3 2. In addition, the Montana Board of Personnel Appeals has
4 adopted the totality of conduct standard when deciding whether or
5 not a Defendant has failed to bargain in good faith. MPEA v. City
6 of Great Falls, ULP 19-85 (July 28, 1986); Montana Education
7 Association v. Laurel School District Nos. 17 and 7-70, ULP 40-93
8 (February, 1995).

9 3. The duty to bargain in good faith is outlined in Volume
10 1, Patrick Hardin, Charles J. Morris, Developing Labor Law, pages
11 608-610 (1992) as follows:

12 [The duty to bargain in good faith is an obligation ... to
13 participate actively in the deliberations so as to indicate a
14 present intention to find a basis for agreement...." This implies
15 both "an open mind and a sincere desire to reach an agreement" as
16 well as "a sincere effort ... to reach a common ground." The
17 presence or absence of intent "must be discerned from the record."
18 Except in cases where the conduct fails to meet the minimum
19 obligation imposed by law or constitutes an outright refusal to
20 bargain, relevant facts of a case must be studied to determine
21 whether the employer or the union is bargaining in good or bad
22 faith. The "totality of conduct" is the standard by which the
23 "quality" of negotiations is tested. Thus, even though some
24 specific actions, viewed alone, might not support a charge of bad-
25 faith bargaining, a party's overall course of conduct in
26 negotiations may reveal a violation of the Act].

27 4. It is clear that the Board considers the entire course of
28 conduct in bargaining, and will not necessarily view isolated
misconduct as a failure to bargain in good faith. Thus, an
employer's withdrawal of tentative agreements, standing alone, does
not constitute bad faith in contravention of the bargaining
obligation. Respondent points out that in Roman Iron Works, as
cited and outlined in Volume 1, Patrick Hardin, Charles J. Morris,
Developing Labor Law, pages 608-610 (1992), "the employer violated
section 8(a)(5) by its unilateral wage increase during

1 negotiations. The employer also engaged in hard bargaining
2 including a reduction of the wage offer during bargaining, denial
3 of a union request for employee addresses, insistence on a right to
4 subcontract, and a demand for significant cost reductions.
5 However, the Board found that the employer met frequently with the
6 union, made complete contract proposals, and made several
7 significant concessions. Under all of these circumstances, the
8 Board found that the employer did not engage in bad-faith
9 bargaining." [citations omitted].

10 SURFACE OR REGRESSIVE BARGAINING

11 5. SVTA contends that the Smith Valley School Board has
12 committed an unfair labor practice through surface bargaining. As
13 contended by Respondent, however, it was the school board which
14 initiated the request to begin negotiations. And, when the school
15 board thought the parties had reached apparent impasse, it was the
16 school board that made a unilateral request for mediation and
17 requested fact finding in order to resolve this dispute.

18 Moreover, the record reflects that neither of the parties were
19 uncooperative in their attempts to set and hold settlement
20 conferences. Neither party refused to meet, and that the school
21 board met approximately 16 times with the Association in an attempt
22 to settle the contract. The record further shows that the school
23 board made a sincere effort to find money within its budget to fund
24 step and lane increases for the 1994-95 school year, and on
25 February 23, 1995, it made an offer to do so.

26 6. More importantly, instead of unilaterally implementing
27 any of its rejected offers, the school board continued to meet and
28 to make offers to the Association. The Association, however, never

1 requested the school board to implement any of its proposals.
2 SVTA's allegations that the school board was engaged in surface
3 bargaining is clearly not supported by the record in this matter.

4 7. With regard to SVTA's claim that the withdrawal of the
5 May 2, 1994 offer constitutes regressive bargaining, as argued by
6 the school board, the Board of Personnel Appeals has held that:
7 "[E]ither party may retract an offer not accepted and revert to a
8 lower offer without being guilty of bad faith bargaining. . . ."
9 AFSCME v. State of Montana, ULP 11-79 (April 3, 1982). When the
10 one year wage freeze offer of May 2 was communicated to the SVTA,
11 it was clearly stated that the offer would be withdrawn if not
12 accepted. That the school board subsequently reinstated its
13 previous offer appears to be that of "hard bargaining," as
14 demonstrated by the parties throughout the collective bargaining
15 process. Contrary to SVTA's contentions, such lower offer did not
16 reach the level of an unfair labor practice act when it actually
17 reinstated its previous offer on May 9, 1994.

18 Under the totality of conduct standard, the record reflects
19 that the school board has not engaged in surface or regressive
20 bargaining tactics. MPEA v. City of Great Falls, ULP 19-85 (July,
21 1986 and Montana Education Association v. Laurel School District
22 Nos. 17 and 7-70, ULP 40-93 (February, 1995).

23 **CONDITION PRECEDENT - THE WITHDRAWAL OF AN UNFAIR LABOR**
24 **PRACTICE CHARGE**

25 8. It is well established that a party may not bargain to
26 impasse over an illegal or permissive subject of bargaining. In
27 affirming the NLRB, however, the Supreme Court also clarified its
28 ruling to reflect that bargaining need not be confined to the

1 statutory subjects. NLRB v. Borg Warner, 356 U.S. 342 (1958), 42
2 LRRM 2034. Thus, the NLRB has held that a party violates the NLRA
3 when it demands that an unfair labor practice charge against it be
4 withdrawn as a condition to agreement. Stackpole Components Co.,
5 232 NLRB 723. 96 LRRM 1324 (1977).

6 9. As contended by the school board, however, it is also
7 well established that the mere request by one party that the other
8 party withdraw an unfair labor practice charge does not violate the
9 law. In Inner City Broadcasting Corp., 270 NLRB 1230 (1984), the
10 NLRB held: "[E]ven assuming that Respondent's comments could be
11 considered that, as a condition precedent to the reaching of an
12 agreement, the Union withdrew its charge and arbitration demands,
13 such a proposal is not per se illegal. However, Respondent could
14 not legally insist to impasse on its acceptance in the face of a
15 clear and expressed refusal by the Union to bargain about the [non-
16 mandatory subjects]" Id. at 1223. A similar result was reached in
17 Carlson Porsche Audi, Inc., 266 NLRB 141 (1983).

18 10. The above mentioned cases establish the proposition that
19 one party may request the other to withdraw an unfair labor
20 practice charge as a condition for settlement, but may not bargain
21 to impasse on the request. Here, however, the school board did
22 not bargain to impasse on this issue because SVTA admitted at the
23 hearing that they intended to withdraw the charges in the event of
24 a settlement. Moreover, the record in this matter indicates that
25 the school board's request to withdraw the unfair labor practice
26 charge did not unreasonably restrain or inhibit the bargaining
27 process between parties. As contended by the board, the record
28 does not reflect the board has conditioned its willingness to meet

1 on the withdrawal of the charge, and the SVTA never objected to
2 such request as a permissive subject over which it would not
3 bargain.

4 11. As pointed out by SVTA in its argument, the overall
5 record indicates that the main sticking point in these negotiations
6 has never been the board's request to drop the unfair labor
7 practice charge. It has been the school board's insistence and the
8 Association's rejection of language which would waive a teacher's
9 step and lane increases after a collective bargaining agreement
10 expires pursuant to the Forsyth case (discussion follows) that
11 deadlocked the parties.

12 12. Clearly, steps and lanes are mandatory subjects for
13 bargaining, therefore, it appears that the board has the right to
14 insist on this language. And, the SVTA has the right to reject it.
15 In so doing, neither party is guilty of a refusal to bargain in
16 good faith.

17 13. In Forsyth Education Association v. Rosebud County School
18 District No. 14, ULP 37-81 (1983) and Lolo Education Association v.
19 Missoula County School District No. 7, ULP 29-86 (1987), the
20 Montana Board of Personnel Appeals held that a school district
21 commits an unfair labor practice when it withholds an experience
22 step under the terms of an expired collective bargaining agreement
23 in the absence of a bargaining impasse.

24 14. The rule announced in Forsyth was derived from the
25 unilateral change doctrine first announced by the United States
26 Supreme Court in NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962).
27 In that case, the Court affirmed the rule that it is an unfair
28 labor practice for an employer to make a unilateral change in any

1 term or condition of employment following the expiration of a
2 collective bargaining agreement without first bargaining to
3 impasse. The Court reasoned that unilateral changes are unlawful
4 because they frustrate the "statutory objective of establishing
5 working conditions through bargaining." Id. at 744. In that case,
6 the employer imposed a wage increase during the course of
7 negotiations.

8 IMPASSE INTERPRETED

9 15. The Board of Personnel Appeals (BPA) adopted a definition
10 of impasse in Bigfork Area Education Association v. Board of
11 Flathead and Lake County School District No. 38, ULP #20-78 (1979).
12 In that case, the BPA cited an NLRB holding in Taft Broadcasting
13 Company, 163 NLRB 475, 478, 64 LRRM 1386 (1967) to define a
14 bargaining impasse as a "deadlock reached by bargaining parties
15 'after good faith negotiations have exhausted the prospects of
16 concluding an agreement.'"

17 In applying this definition, BPA held that it must consider
18 the "bargaining history, the good faith of the parties in
19 negotiations, the length of the negotiations, the importance of the
20 issue or issues as to which there is disagreement, [and] the
21 contemporaneous understanding of the parties as to the state of
22 negotiations. . . ." before determining if a bona fide impasse
23 permits an employer to implement a unilateral change in a mandatory
24 subject of bargaining.

25 16. As the U.S. Supreme Court found in NLRB v. Borg-Warner
26 Corp., Wooster Div., 356 US 342, 352, 42 LRRM 2034 (1958), some
27 difficulty exists in establishing the "inherently vague and fluid
28 ... standard" applicable to an impasse reached by hard and

1 steadfast bargaining, as distinguished from one resulting from an
2 unlawful refusal to bargain. And, the NLRB found that in
3 collective bargaining "part of the difficulty arises from the fact
4 that the law recognizes the possibility of the parties reaching an
5 impasse." (40 LRRM 98, 103-6 (1957))

6 17. The difficulty of applying this definition has caused
7 some of our federal courts to reject the impasse standard. In NLRB
8 v. Citizens Hotel, 326 F.2d 501, 55 LRRM 2135 (5th Cir. 1964), for
9 example, the Fifth Circuit Court of Appeals held: "[A]n employer
10 may make changes without the approval of the union as the
11 bargaining agent. The union has no absolute veto power under the
12 Act. Nor do negotiations necessarily have to exhaust themselves to
13 the point of the so-called impasse." Id. at 2137.

14 18. Here too, as contended by Respondent, on the surface it
15 is difficult to know whether parties were deadlocked and in true
16 impasse. The overall record clearly indicates, however, that Smith
17 Valley trustees honestly believed that they were at impasse by the
18 end of May, 1994, even to the extent they requested mediation on
19 June 20, 1994. Notwithstanding the fact subsequent bargaining
20 developments show further progress in negotiations, leading up to
21 a tentative agreement pursuant to the contract proposal in April,
22 1995 (Finding of Fact No. 29), parties still remained deadlocked
23 over the language in 10.1.-- "No increases in benefits or salary
24 shall be provided without proper written approval of the parties."

25 19. As the Board of Personnel Appeals stated in Forsyth,
26 "This decision by the BPA is not as onerous as suggested by the
27 school district and amici curiae. That is so for the reason that
28 if during negotiations impasse occurs, then the employer is free to

1 unilaterally implement its last, best, final offer." (Emphasis
2 added) Forsyth Education Association v. Rosebud County School
3 District #14, 2 Ed Law 230, 242 (1983). As the facts of this case
4 make clear, however, impasse occurred on the above mentioned
5 "language" issue even prior to the expiration of the current
6 contract, and parties remain in deadlock.

7 20. A number of holdings indicate that a deadlock on all
8 issues is not necessary to a finding of impasse. Jordan Bus Co.,
9 107 N.L.R.B. 717 (1954) and Essex Wire Co., 19 N.L.R.B. 51 (1940).
10 In Sharon Hats, Inc., 127 N.L.R.B. 947 (1960), enforced, 289 F.2d
11 628 (5th Cir. 1961), the parties bargained about wages and other
12 matters, but after two months without reaching agreement, parties
13 were deadlocked only on the issue of wages. The Board found that
14 impasse in bargaining had been reached. Here, as in Sharon Hats,
15 Inc., the parties remained deadlocked on only one issue--the 10.1
16 "language" above mentioned.

17 21. Furthermore, as contended by the school board, given the
18 reduction in the district's budget, it is understandable why the
19 school board would ask for such a provision as a condition for
20 settlement. And, making this request less than two months after
21 the beginning of negotiations does not constitute a failure to
22 bargain in good faith. Moreover, consistent with the Court's
23 pronouncement in Katz, the Montana Public Employees Collective
24 Bargaining Act was adopted to encourage public employers and
25 employee unions to determine the terms and conditions of employment
26 at the bargaining table. Clearly, the bargaining history herein
27 reflects both SVTA and the board made good faith efforts to resolve
28

1 the dispute over this very important language issue. NLRB v. Katz,
2 369 U.S. 736 (1962).

3 22. Here, the school board essentially argues that Forsyth
4 should be overturned, and SVTA argues it is controlling and must
5 stand. The parties have provided citation to and discussion of a
6 number of cases supporting their contentions on that matter. In
7 this case, however, as before concluded from the facts, all of the
8 factors (Length of Negotiations; Good Faith of Parties; Importance
9 of the Issue; Contemporary Understanding) indicating impasse are
10 present. The parties are at impasse.

11 23. Arguendo, if there was absence of impasse in this matter,
12 as contended by the SVTA, the Hearing Officer would be bound by
13 precedents established by the Board of Personnel Appeals for whom
14 he is conducting the hearing. Clearly, Forsyth sets forth
15 precedent that must be followed by the Department of Labor and
16 Industry. Certainly, the Hearing Officer in this matter has no
17 authority to reverse established principles of law or to reverse a
18 decision of the Montana Supreme Court.

19 24. Furthermore, as pointed out by the SVTA, the school board
20 provided no citations to any authority holding that the Hearing
21 Officer has such power to overturn the Board. Moreover, in Chester
22 School District No. 33. et. al v. Montana Education Association
23 et. al, Declaratory Ruling No. 1-94, the School District asked the
24 Board to revisit the Forsyth holding and the Board declined to do
25 so. SVTA also points out that House Bill 264 was introduced in the
26 recently completed legislature to overturn Forsyth and ultimately
27 failed.
28

1 25. Here, having concluded the parties are at impasse,
2 Forsyth is not controlling. In Forsyth the Montana Supreme Court
3 held in part:

4 While the appellant School district argued the BPA had ordered
5 it to automatically grant teachers' wage increases under the
6 terms of the expired contract, we find no such ruling by the
7 BPA in its order. It simply ordered that, in the absence of
8 an "impasse," the provisions of the expired contract may not
9 be unilaterally changed by the employer.

10 *Id.* at 365 (Emphasis added)

11 26. Based on the overall record, the Smith Valley school
12 board has not violated Section 39-31-401(1) or (5), MCA. The
13 school board has not engaged in surface or regressive bargaining,
14 nor did it refuse to bargain in good faith.

15 RECOMMENDED ORDER

16 This unfair labor practice charge is dismissed and the
17 requested relief is denied.

18 SPECIAL NOTICE

19 NOTICE: You are entitled to review of this Order pursuant to
20 Section 39-31-406, MCA. Review may be obtained by filing a written
21 notice of appeal with the Board of Personnel Appeals postmarked no
22 later than September 20, 1995. This time period
23 includes the 20 days provided for in Section 39-31-406(6), MCA, and
24 the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service
25 of this Order is by mail.

26

1 The notice of appeal shall consist of a written appeal of the
2 decision of the hearing officer which sets forth the specific
3 errors of the hearing officer and the issues to be raised on
4 appeal. Notice of appeal must be mailed to:

5 Board of Personnel Appeals,
6 Department of Labor and Industry
7 P.O. Box 6518
8 Helena, MT 59604

9 DATED this 28th day of August, 1995.

10 DEPARTMENT OF LABOR & INDUSTRY
11 HEARINGS BUREAU

12 Gordon D. Bruce
13 Gordon D. Bruce
14 Hearing Officer

15 CERTIFICATE OF MAILING

16 The undersigned hereby certifies that true and correct copies
17 of the foregoing documents were, this day served upon the following
18 parties or such parties' attorneys of record by depositing the same
19 in the U.S. Mail, postage prepaid, and addressed as follows:

20 Michael Dahlem, Staff Attorney
21 Montana School Boards Association
22 One South Montana Avenue
23 Helena, MT 59601

24 Karl Englund
25 Attorney at Law
26 P.O. Box 8142
27 Missoula, MT 59807

28 The undersigned hereby certifies that true and correct copies
of the foregoing documents were, this day, served upon the
following parties or such parties' attorneys of record by means of
the State of Montana's Deadhead mail service.

DATED this 28th day of August, 1995.

Christina K. Heland